

BORNEO HOUSING MORTGAGE FINANCE BHD

a

v.

MYGAL GIBIE & ANOR

HIGH COURT SABAH & SARAWAK, SANDAKAN

b

LINTON ALBERT JC

[SUIT NO: TSC (52) 48-2002]

9 MARCH 2004

LIMITATION: *Commencement of action - When action commenced - Breach of contract - Recovery of interest - Whether action statute-barred - Limitation Ordinance (Cap 72) (Sabah), s. 19(1), Sch. items 95, 101*

c

CONTRACT: *Breach - Limitation - Recovery of interest - Whether action statute-barred - Limitation Ordinance (Cap 72) (Sabah), s. 19(1), Sch. items 95, 101*

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This was an appeal by the appellant against the learned sessions court judge's decision dismissing the appellant's action for recovery of interest owed by the respondents pursuant to a loan agreement between the parties. The respondents had used the loan to purchase a shop lot ('the property') which was not completed and ultimately abandoned by the developer. The respondents submitted that since they had breached the loan agreement in 1991, the appellant's action was statute-barred by virtue of item 95 of the Schedule to the Limitation Ordinance (Cap 72) (Sabah) ('the Ordinance') which states that the limitation period for a breach of contract is six years and begins to run when the contract is broken.

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The appellant, however, contended that: (i) since the respondents had, by virtue of two letters dated 21 August 2000 and 7 February 2002, respectively acknowledged their liability to the appellant, s. 19(1) of the Ordinance would render the appellant's action well within the six-year period imposed by item 95 of the Schedule to the Ordinance thereof; (ii) item 101 of the Schedule to the Ordinance, which prescribed 12 years as the limitation period, was applicable in this case; and (iii) the appellant could only ascertain the amount of the debt due upon the sale of the property, and since the property was only successfully auctioned off on 24 February 2000, the appellant's cause of action was well within item 95 of the Schedule to the Ordinance as time only began to run after the property was auctioned off.

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a Held (dismissing the appeal):

[1] Section 19(1) of the Ordinance was of no assistance to the appellant because the letters containing the respondents' acknowledgment of liability were written after the prescribed period of six years in item 95 of the Schedule to the Ordinance had expired. (p 529 e)

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[2] Item 101 of the Schedule to the Ordinance, which prescribed 12 years as the limitation period, was clearly not applicable as the loan agreement was not a charge. The fact that the loan agreement empowered the appellant to sell the property and apply the proceeds of sale toward the settlement of the loan did not convert the loan into money charged upon immovable property within the meaning of item 101 of the Schedule to the Ordinance. (p 529 f)

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[3] The loan agreement provided for the concurrent enforcement of remedies; the appellant could, therefore, have elected to sue the respondents or sell the property, simultaneously or successively. In this instance, the appellant chose to enforce its remedies successively, and ultimately rued the consequences because in its preoccupation with the effect of the sale of the property, the cause of action against the respondents had become statute-barred. (p 530 a-b)

e Case(s) referred to:

China & South Sea Bank Ltd v. Tan [1989] 3 All ER 839 (**refd**)
KEP Mohamed Ali v. KEP Mohamed Ismail [1981] 2 CLJ 10 (**refd**)
Loh Wai Lian v. SEA Housing Corporation Sdn Bhd [1987] 2 MLJ 1 (**dist**)
Nadefinco Ltd v. Kevin Corporation Sdn Bhd [1978] 2 MLJ 59 (**refd**)
f *Nik Che Kok v. Public Bank Bhd* [2001] 2 CLJ 157 CA (**refd**)
OCBC Ltd v. Philip Wee Kee Puan [1984] 2 CLJ 4; [1984] 1 CLJ (Rep) 25 PC (**refd**)
Sarawak Securities Sdn Bhd v. William Leong Wai Ling & Ors [2002] 1 MLJ 294 (**refd**)
g *Sia Siew Hong & Ors v. Lim Gim Chian & Anor* [1996] 3 CLJ 26 CA (**dist**)

Legislation referred to:

Limitation Ordinance 1953, s. 26(2)

Limitation Ordinance (Cap 72) (Sabah), s. 19(1), Sch. items 95, 101

For the plaintiff/appellant - Jeyan Marimuttu; M/s J Marimuttu & Partners

h *For the defendants/respondents - Amin Jaafar; M/s Amin Jaafar & Co*

Reported by Suresh Nathan

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JUDGMENT

Linton Albert JC:

I had on 10 February 2004 dismissed the appellant's appeal against the decision of the learned Sessions Court Judge and now give the reasons therefor.

The respondents had purchased a shop lot (the property) from one United lands Sdn Bhd (the developer). The purchase of the property was financed by obtaining a loan from the appellant. The loan was for a sum of RM45,000 and was secured by an agreement dated 21 December 1985 (the loan agreement) between the appellant and the respondents. The respondents did not get the property because it was part of a project which the developer could not complete and ultimately abandoned. The loan was only partially released up to RM31,500 and the total repayment made by the respondents was RM31,432, only RM68 short of the amount disbursed by the appellant. The interest on the loan was, however, another matter and it amounted to RM82,203.84 calculated up to 31 December 2001. The property was auctioned off by the appellant on 24 February 2000 and the net proceeds amounting to RM46,413.07 was retained by the appellant to account for the amount still outstanding and despite that a sum of RM37,290.83 was still owed by the respondents to the appellant as at 31 December 2001. The appellant refused to waive any part of the interest it had calculated in accordance with the loan agreement and accordingly commenced proceedings to recover the whole amount of RM37,290.03 on 13 March 2002.

By cl. 7 of the loan agreement it was stipulated that in the event the respondents:

- 1) make default in payment of any one or more of the installments or any interest thereon or other sums or moneys (whether principal or interest) herein agreed or covenanted by the Borrower to be paid ...

... then and in any of such cases the Loan and any interest thereon and all other sums or moneys (whether principal or interest) for the time being owing under this Agreement shall immediately become payable by the Borrower to the Company and the Company shall forthwith become entitled to recover the same with interest thereon at the prescribed Rate and to exercise the rights and powers upon default herein this Agreement and by law provided without any previous notice to or concurrence on the part of the Borrower.

Clause 8 which provided for the concurrent enforcement of remedies was as follows:

Upon default by the Borrower in the manner in Clause 7 hereinbefore provided the Company shall be entitled to exercise all or any of the rights and powers following:

- a* 1) ... ;
- 2) ... ;
- b* 3) the right and power to sell and assign the said Property as the absolute unencumbered owner thereof at such price or prices and in such manner as the Company shall in its absolute discretion think fit free from any interest of the proceeds of sale in or towards the satisfaction of the Loan and all principal and interest and other monies due to the Company hereunder and all costs of and occasioned by such sale or sales and the Company shall only pay to the Borrower the balance of the proceeds of such sale or sales if any after deduction of such principal and interest
- c* and other moneys aforesaid.

d Learned counsel for the respondents, Amin Jaafar, submitted that the appellant's action was statute-barred. The last payment made by the respondents to the appellant which was not disputed, was on 30 October 1991. It was, therefore, argued that there was a breach of the loan agreement by the respondents immediately thereafter and that time also began to run concurrently from the breach. Learned counsel relied on Item 95 of the Sabah Limitation Ordinance (Cap 72) which states that the limitation period for the breach is six years and time begins to run when the contract is broken. There was, of course, no controversy as to the loan agreement being a contract in writing and so it was

e argued that the action commenced by the appellant on 13 March 2002 was well beyond the limitation period of six years. Jeyan Marimuttu, learned counsel for the appellant, disagreed by emphasizing on the undisputed fact that the respondents had by virtue of two letters written by their solicitors dated 21 August 2000 and 7 February 2002 respectively acknowledged their liability to

f the appellant and, therefore, the application of s. 19(1) of the Sabah Limitation Ordinance (Cap 72) would render the appellant's action well within the period of six years imposed by Item 95 thereof. Section 19(1) of the Sabah Limitation Ordinance (Cap 72) reads as follows:

- g* (1) If before the expiration of the period prescribed for a suit in respect of any property or right an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment
- h* was so signed.

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The Privy Council case of *OCBC Ltd v. Philip Wee Kee Puan* [1984] 2 CLJ 4; [1984] 1 CLJ (Rep) 25 was cited by learned counsel for the appellant. It was held in that case, as the Federal Court did, in *K.E.P. Mohamed Ali v. K.E.P Mohamed Ismail* [1981] 2 MLJ 10 that an acknowledgment of a statute-barred debt constituted the accrual of the right of action to recover the debt. With respect, I do not think that these two cases are of any assistance to the appellant. Apart from the fact that they both relate to the Limitation Ordinance 1953 which does not apply to Sabah (see *Sarawak Securities Sdn Bhd v. William Leong Wai Ling & Ors* [2002] 1 MLJ 294) s. 26(2) of the Limitation Ordinance 1953 which was the specific provision considered in those two cases is not in *pari materia* with s. 19(1) of the Sabah Limitation Ordinance (Cap 72). Section 26(2) of the Limitation Ordinance 1953 reads as follows:

where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgement or the last payment.

I respectfully agree with the submission of learned counsel for the respondents that s. 19(1) of the Sabah Limitation Ordinance (Cap 72) was of no assistance to the appellant because the letters which constituted the respondents' acknowledgement of liability was after the prescribed period of six years had expired. I do not hesitate also to reject the appellant's contention that Item 101 of the Sabah Limitation Ordinance (Cap 72) which prescribes 12 years as the Limitation period is applicable. The loan agreement is clearly not a charge and, therefore, Item 101 does not apply. The fact that the loan agreement empowers the appellant to sell and assign the property and apply the proceeds of sale towards the settlement of the loan does not convert the loan into money charged upon immovable property within the meaning of Item 101.

Mr. Jeyan Marimuttu also submitted that time only runs after the successful auction of the property on 24 February 2000 which makes the appellant's cause of action well within Item 95 of the Sabah Limitation Ordinance (Cap 72). Learned counsel for the appellant relied on cl. 8 of the loan agreement, which is reproduced above, read with cl. 15 which is as follows:

If the amount realized by the Company on a sale of the said Property in pursuance of Clause 8(3) hereof is less than the amount due to the Company the Borrower shall pay to the Company the difference between the amount due and the amount so realized and until payment will also pay interest on such balance at the prescribed Rate with yearly rests.

- a* It was argued, therefore, that only after invoking cl. 8 and cl. 15 of the loan agreement, could the appellant calculate and ascertain the amount of debt due from the respondents to the appellant. There is no merit in this argument. The loan agreement provided for the concurrent enforcement of remedies. The appellant could, therefore, elect to sue the respondents or sell the property
- b* simultaneously or successively (see *China & South Sea Bank Ltd v. Tan* [1989] 3 All ER 839). Here, the appellant chose to enforce its remedies successively and ultimately rue the consequences because in its preoccupation with and misapprehension of the effect of the sale of the property, the cause of action against the respondents had become statute-barred. In *Nik Che Kok @ Nik Soo Kok v. Public Bank Bhd* [2001] 2 CLJ 157, an authority cited by learned
- c* counsel for the respondents, the Court of Appeal held that for the purpose of limitation, time began to run from the earliest time at which a creditor could have brought an action. In *Nadefinco Ltd v. Kevin Corporation Sdn Bhd* [1978] 2 MLJ 59 the Federal Court rejected the proposition by the creditor that time began to run from the date of the winding up of the debtor and held that the
- d* cause of action accrued the instant the debtor failed to pay the first installment due to the creditor and the action was barred by Limitation because the action was commenced more than six years after the cause of action arose. I also agree with the contention of learned counsel for the respondents that *Loh Wai Lian v. S.E.A. Housing Corporation Sdn Bhd* [1987] 2 MLJ 1 and *Sia Siew Hong & Ors v. Lim Gim Chian & Anor* [1996] 3 CLJ 26 cited by the
- e* appellant's counsel ought to be distinguished. In *Loh Wai Lian* the purchaser could not successfully maintain that the vendor's action was statute-barred because there was an express contractual obligation to pay a single sum which could not become due, because it could not be ascertained, until the occurrence
- f* of the event stated in the contract. Similarly in *Sia Siew Hong* the lender's cause of action against the borrower on the contract of indemnity did not begin to run until after the property under a third party charge had been disposed of in order to ascertain the amount of loss the lender was entitled to recover from the borrower.
- g* Having conclusively found that the learned Sessions Court Judge was correct in deciding that the appellant's action was statute-barred, I do not think I need to fortify my reason for dismissing the appeal by proceeding to determine whether the learned Sessions Court Judge was also correct in his finding that the appellant had been guilty of inordinate and unreasonable delay in enforcing
- h* its remedy. I had, therefore, for the reasons set out above affirmed the decision of the learned Session Court Judge and accordingly dismissed the appeal with costs.
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